SOCIALIZATION OF THE LAW

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FOREWORD

The great master-students in the development of the principles of jurisprudence of modern civilization were Friedrich Carl von Savigny (1779–1861), Bernhard Windscheid (1817–1892), and Rudolph von Jhering (1818–92). These savants were all Germans. Each was a master of history, procedure, and applications of the law of his time and of the Roman Law, yet each entertained different points of view as to the development, evolution, and forces which brought principles of jurisprudence into existence (perhaps excepting acts of legislative bodies).

Savigny was the master-mind of the Historical school of the law. He says that its object "is to trace every established system to its roots and then discover an organic principle, whereby that which still has life may be separated from that which is lifeless and only belongs to history."[1] One may ask, why do any of Savigny's principles of law have "life"?

On account of the limitation of such a paper as this we content ourselves with a description of Savigny's life-work by J. E. C. Montmorency. He says:

> It was reserved for Savigny to bring the daylight of the Renaissance to the science of law. He showed us that the *law* itself is subject *to law*, that is, no arbitrary expression of the will of a law-giver, but is itself a thing obedient to a cosmic process. To show that law is itself the expression of a juristic process that runs through the ages was in itself an achievement of the highest order; but to go on to trace, as Savigny traced, what we may call the natural history of law, to trace its organic growth as a living thing, evolving with the evolutions of races and kingdoms and tongues, was still a greater triumph.[2]

What is this law to which "the law" is subject? Savigny was unable to answer this question under the then existing stage of

[1] *Society of Comparative Legislation Journal*, II (1909), 52. [2] *Ibid.*

development of natural and social sciences. Savigny was like the man who first observed that the tides rose and fell in a uniform manner throughout the world and announced the fact, but was unable to find that the cause of the tide's ebb and flow was the force of attraction of the moon for the mass of the oceans, and that the physical law which controlled their motion is that the force of attraction between any two particles of matter is equal to the product of their masses divided by the square of the distance between them.

Thus Savigny has left it to others to show what the forces, social and economic, are that are continuously casting up principles of the Law (with "life") and what the law is to which the Law is subject.

Savigny's opposition to legislation was so pronounced that the legislative era could not have been inaugurated as long as the Historical school remained in the ascendency. However, he resigned his professorship at Berlin University, and accepted the appointment as head of the Department of Justice, which was created especially for him by Frederick William IV, of Prussia. He lived to see the formulation of the General German Bills of Exchange Code (1847), the General German Commercial Code (1861), but he died before the date of the Imperial Statute (1873) which created a commission to codify the whole domain of the private law that led to the enactment of the German Civil Code (1896). In addition to these facts the agitation of the socialists for social reform in the laws had acquired such momentum at the time of his death that Bismarck was driven to put through the Reichstag the Code of Social Insurance Laws which provided insurance against sickness, accidents, invalidity, and old age (1883–87) that at the close of the nineteenth century distributed among the working classes almost $200,000,000 annually in such insurance.[1]

Bernard Windscheid (1817–92) founded a legal theory which has been a point of great controversy in German legal science for several decades. He wrote a celebrated work—*Wille und*

[1] *Michigan Law Review*, March, 1912. *Economic Basis of Compulsory State Insurance; Workmen's Insurance in Europe* (Frankel & Dawson, 1910), pp. 89–114.

Willenerklärung (1878). He defined legal rights from the standpoint of the protection of the "will."[1]

Dr. Rudolph von Jhering (1818–92) died in Göttingen in the fall of 1892. Jhering was at the time of his death the most profound student of law that the world had known. Savigny treated the law as a jurisprudence of concepts. He treated it from a purely subjective point of view. Windscheid defined rights from the point of view of the protection of the will. Jhering rejected the will as the central factor and set up a jurisprudence of facts against Savigny's jurisprudence of concepts. Windscheid's view logically developed is an individualistic, unhistorical, and formal conception of the law. Jhering formulated his notions of *interests* in the "Geist,"[2] which enabled him to reach the conception of the "Zweck"[3] or purpose of legal principles. If rights are legally protected interests, it therefore follows that the state must select what interests it regards as most worthy of protection, which leads logically to the question of making inquiry of *purpose* in the law, which Jhering stated in the form of the principle, "the object is the creator of the law."[4] On this stairway of three steps Jhering built his theory of the law and invested the law with a positive social function. During the last forty years of his life he saw the reactionary conservatism of the Historical school of Savigny supplanted by the epoch of legislation and socialization of the law (as pointed out above) which marks the most significant development of the law in modern times—the change from the individual to the social emphasis.

Jhering, in his work *The Struggle for Law* (p. 2),[5] says respecting the origin of law:

> Law is an uninterrupted labor, and not of the state power only, but of the entire people. The entire life of the law, embraced in one glance, presents us

[1] "Recht ist eine von der Rechtsordnung verliehene Willensmacht der Willensherrschaft" (Windscheid, *Lehrbuch des Pandektenrechts*, 9th ed. [Kipp], 1906, I, 156.

[2] "Der Geist des Ronieschen Rechts auf den verchiedenen Stufen seiner Entwickelung" (1852–65).

[3] "Der Zweck im Recht" (1877–83).

[4] Jhering's *The Struggle for Law*, translation by J. J. Lalor (Chicago: Callaghan & Co., 1915), p. xix.

[5] *Der Kampf ums Recht* (1872), translation from the fifth German edition by John J. Lalor. Chicago: Callaghan & Co., 1915.

with the same spectacle of restless striving and working of a whole nation, afforded by its activity in the domain of economic and intellectual production. Every individual placed in a position in which he is compelled to defend his legal rights takes part in this work of the nation, and contributes his mite towards the realization of the idea of law on earth.

Jhering then develops these conceptions by endeavoring to show that: "The Life of the Law is a Struggle"; "The Struggle for his Rights a Duty of the Person whose Rights have been violated to himself"; "The Assertion of one's Rights a Duty to Society"; "The Importance of the Struggle for Law to National Life."

During the forty-four years since Jhering published this work the world has grown more in the industrial development and accumulations and concentration of vast wealth than it did during the two thousand years preceding. Today there are employed 5,000, 10,000, or 25,000 persons in one factory and even 200,000 by one employer. One machine running automatically for months without stopping, attended by a dozen men, will produce 80,000 pint bottles in one day of 24 hours at a cost of less than 8 cents per gross, the labor for which formerly cost $1.35.[1]

Little could Jhering conceive of his fatherland raiding, deporting, and enslaving the people of Belgium (1914–16) in violation of every principle for which he contends in his *Der Kampf ums Recht.* Little could he conceive of almost the entire population of the eastern hemisphere locked in the death struggle for the control of commerce and raw materials of the world, sacrificing tens of millions of the picked male population of twenty nations!

He could not conceive of bread and meat tickets for 135,000,000 of people, of thousands of war planes, of zeppelins throwing tons of dynamite on London, hundreds of submarine battleships and merchantmen, and the entire economic existence of six nations of Europe regulated by statute!

There was and still is much truth in Jhering's conclusions developed in his *Struggle for Law,* but much less now under vastly different economic and industrial conditions. When Jhering wrote this address he could not have foreseen the centralization of trade, credit, industry, and vast populations which have during the last forty years revolutionized the world. In ancient society individual

[1] The Owens Bottle Machine (Toledo, Ohio).

rights were submerged in the activities of the group. The *person* has never received as high a degree of protection from the law as have the claims of property. When Jhering wrote this lecture the Historical school had reached the summit of its influence, and with it the rights of individual persons had reached their highest degree of development in an evolution of many centuries. If anything may be safely prophesied of the immediate future, one may perhaps say (with Tagore)[1] that the individual who is one of many thousands performing a single operation with great speed for eight hours with a single machine is on his way to the loss of his identity.

DISCUSSION

1. All of the civilizations of the Old World have followed the same cycle of development—the Persian, Egyptian, Greek, Roman, and Spanish. Each in its turn became world-conquerors of the then known commercial world in their lust for the conquest of silver, gold, and political and commercial world-power. Each in its turn made advances over its predecessors in learning, art, science, law, accumulations of wealth, and control of the world's commerce, and each in its turn surpassed its predecessors in the magnificence of its displays of wealth, national follies of its people, and the depths of the depravity and moral debaucheries of the ruling classes of its people. Each perished as a nation. Each fell from the then supposed height of civilization to a degraded and degenerate people.

The French through the instrumentality of Napoleon conquered almost the whole of Europe and ruled and governed the same for a decade of years. Yet the destruction of Napoleon and the French dominion over the countries which he had conquered did not result in the perishing of the French civilization nor in a great moral degradation of her people. This is proved by the successes of the French nation in the present European war. The French nation in proportion to its population is the equal, if not the superior, of any of the other nations engaged in the present war, in the great national virtues: courage, self-denial, morals, thrift, national organization, and intellectual gifts of the highest order.

[1] Toledo, Ohio, Lecture, November 17, 1916.

That the French nation has not gone the way of its predecessors of the world-conquerors is, we think, due to the socialization principles of justice found in the Code Napoleon and its development: the abolition of hereditary aristocracy and primogeniture, the limitation of testamentary disposition of property, the introduction of uniform legal procedure in the administration of the law by the courts, the nationalization of educational institutions and elementary schools, the introduction of vocational educational training, social insurance for the working classes and the establishment of many national devices for the encouragement of efficiency and economic thrift of the common people.

2. It certainly cannot be successfully maintained that the individual who is one of many hundreds or thousands of employees working for a single employer can contract on an equality with him respecting wages and conditions of employment under modern industrial conditions.

The proof of this assertion is shown as follows: For more than a hundred years small and large groups of employees, ranging from local to state, national, and international organizations, have been organized to provide insurance against sickness, accidents, invalidity, old-age pensions, and out-of-work and burial benefits. Some of these have succeeded for a short period, but all have finally failed in accomplishing their purposes. As a consequence all of the European countries, beginning with Germany, which was the first to enact laws which provided insurance against sickness, accidents, invalidity, and old-age pensions which today protect her entire working population and their dependents, some 22,000,000 people (1883–87),[1] have in some form provided the same kind of social insurance for the protection of their working population. Great Britain passed a compensation act in 1897 (amended 1906), which provides compensation for 13,000,000 workmen, and in 1911 enacted the national insurance act, known as the David Lloyd George act, which provides compulsory insurance against sickness, out of work, invalidity, confinement of women, and old-age pensions on behalf of almost the entire working population of Great

[1] *Fourth Special Report of the Commissioner of Labor of the United States* (Carroll D. Wright, 1893); Frankel & Dawson, *Workmen's Insurance in Europe*, 1910.

Britain.[1] Since 1910 thirty-one of the United States have enacted compensation acts which provide compensation for injuries to workmen.[2] Such state insurance or compensation is limited in amount of the compensation provided to the *public purpose* conserved. That public purpose consists in the prevention of workmen and those who are dependent upon them from becoming public charges on account of sickness, accidents, out of work, invalidity, and old age. It looks toward the provision for the worker and those dependent upon him of at least a minimum standard of subsistence for which the working mass themselves as consumers in the end must largely pay, and a provision compatible with a wholesome, commendable social welfare and a proper national, industrial, and political government organization.

The foregoing are illustrations of the purpose of the law ("Zweck") as expounded by Jhering.

They relate to the legal evolution of laws enacted by the state, which at a minimum cost provided the working masses with a whole-life provision having a minimum physical standard compatible with a wholesome public welfare.

3. In the second place, the individual workman singlehanded is not able under modern industrial conditions to maintain his equality of contractual rights respecting a just wage and rational working conditions. He has formed local unions, trade unions, central labor bodies, state federations of labor, international labor organizations. When they have failed in collective bargaining respecting wage scales and working conditions, they have resorted to the strike, accompanied more or less with violence.

The wastage accompanying such strikes and lockouts has led to the Canadian, Australian, New Zealand, and the like quasi-compulsory government boards of arbitration of labor disputes. On the event of the failure of the four railway organizations to obtain concessions which they demanded of the railways when they were about to strike, threatening to paralyze the entire transportation system of 100,000,000 people, Congress passed "an act to

[1] Boyd's *Workmen's Compensation*, pp. 1113–74. (Indianapolis: Bobbs-Merrill Co., 1913.)

[2] *Negligence and Compensation Cases Annotated*, X (1916), 5–9. (Chicago: Callaghan & Co.)

establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes."[1]

Emphasis should here be laid upon the fact that the organization of railway trainmen, firemen, engineers, and conductors are national organizations.

The Adamson law just cited provides for an increase of wages and a standard eight-hour day and a commission to investigate wages, hours of labor, and working conditions of employees of carriers engaged in interstate and foreign commerce. This law is unquestionably constitutional for the same reasons precisely as is the law creating the Interstate Commerce Commission. The constitutionality of the latter act is conceded as duly authorized by Art. 1, sec. 8, 3, of the Constitution, which provides that "Congress is authorized to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Interstate Commerce Commission is vested with the authority to regulate and in effect to fix the rates charged by interstate carriers.

The Adamson act will naturally be superseded by a court vested with the authority to adjudicate all disputes between the employees of interstate carriers and their employers. These disputes in their last resolution relate to the wage for a given number of hours and working conditions.

It is to be noted that the largest factor which enters into rates regulated by the Interstate Commerce Commission is the pay-roll of the carriers. To regulate rates you must therefore directly or indirectly regulate wages. The legal basis for regulating wages is the same as that for regulating rates, which has already been settled in creating the Interstate Commerce Commission.

In justification of the authority of Congress to create a court to adjudicate disputes respecting wages and working conditions between carriers and their employees, it is sufficient here to cite authorities covering the following points:

The authority of Congress extends to all international and interstate commerce[2] (including transportation), embracing all of the

[1] Public Document 252, Sixty-fourth Congress, H.R. 17700; approved September 3 and 5, 1916.

[2] *Gibbons* v. *Ogden*, Wheaton IX, p. 189. (February Term, 1824.)

means as well as the subjects thereof, including persons in either capacity.[1]

For these reasons there should be a right of appeal by either employer or employees to the Interstate Commerce Commission or to the Supreme Court of the United States.

Pending the determination of the hearing of the disputed questions before such court, the government should protect either employer or employees in maintaining the *status quo*. Such steps constitute the natural course of the evolution of the law.

4. The public should be reminded that—

Trade and commerce scarcely came within the range of Congress under the articles of confederation. The many and great evils resulting from this gave the most direct and vigorous impetus to the struggles for reform which led to the Philadelphia Convention and to the adoption of its plan for a constitution. The convention, therefore, naturally considered it to be one of its greatest tasks to nationalize the Union in this respect. It has been rightly said that the consolidation of the industrial interests of the country has proved to be the strongest bond of the federal states.[2]

5. There is a similar legal basis for the creation of courts by the states finally to determine labor disputes respecting wages and working conditions, with an appeal to a higher court. These principles have been finally established by the Supreme Court of the United States in *Munn* v. *The People of Illinois*, 94 U.S.R. 113–54. Chief Justice Waite states these principles briefly as follows:

The state is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

From this source come the police powers, which, as said by Chief Justice Taney in the *License Cases*, 5 How. 583; 12 L., ed. 291, "are nothing more or less than the powers of government inherent in every sovereignty, ... that is to say, ... the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another and the manner in which each citizen shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hack-

[1] *The Passenger Cases*, Howard VII, p. 283. (*Smith* v. *Turner* and *Norris* v. *Boston*. January, 1849.)

[2] Von Holst's *Constitutional History of the United States*, p. 136, sec. 38 (1887). (Chicago: Callaghan & Co.)

men, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects, and we think that it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against intereference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . . the rates of wharfage at private wharves . . . . the sweeping of chimneys, and to fix the rate of fees therefor, ... and the weight and quality of bread," 3 Stat. at L. 587, chap. 104, sec. 7; and in 1848, "to make all necessary regulations respecting hackney carriages, and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers." 9 Stat. at L. 224, chap. 42, sec. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of use, of private property necessarily deprived an owner of his property without the due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation. . . . .

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. . . . .

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

6. *Socialization of the law by means of state and federal statutes reflected by the development of legal principles in connascence with the economic evolution of the United States of America.*—The scope of a paper of this character only permits the directing of attention to some of the most important phases of our economic development.

Statutes imposing a liability upon fire-insurance agents based upon the amount of the insurance effected by them for the benefit of a fund to care for sick and injured firemen.[1]

Statutes enacted by the state of Illinois regulating the price charged by grain elevators (especially those situated in Chicago, the center of the grain trade of the United States) for the storage of grain.[2]

Acts for the protection of wool-growers and the confiscation of dogs by levying a tax on dogs and placing the collections in a fund and distributing the same through state officers in paying damages to owners of sheep killed by dogs.[3]

Statutes in regulation of the operation of coal mines on a large scale, providing inspections for the safety of the operatives and levying the cost of the same against the owners of the mines.[4]

Statutes in regulation of smelters and deep-mining operations, providing for the protection of the health and safety of the operatives.[5]

Statutes regulating the oil and gas business for the purpose of protecting the public and adjacent owners against waste.[6]

Statutes which guarantee bank deposits by levying a tax against the bank, placing the collections in a fund administered by public officers in interest of depositors of banks which have failed.[7]

The workmen's compensation acts of thirty-one states,[8] acts to provide compensation for employees of the United States suffering injuries while in the performance of their duties,[9] and the Federal Safety Appliance acts, which provide protection for employees of railroads engaged in interstate and foreign commerce.[10]

[1] *Firemen's Benevolent Insurance Ass'n.* v. *Lounsbury*, 21 Ill. 511 (1859).

[2] *Munn* v. *Illinois*, 94 U.S. 113 (1875).

[3] *Holst* v. *Roe*, 39 O.S. 340 (1877), and cases there cited.

[4] *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U.S. 203 (1902).

[5] *Holden* v. *Hardy*, 169 U.S. 366 (1898).

[6] *The Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900).

[7] *Noble State Bank* v. *Haskell*, 219 U.S. 104 (1911).

[8] *Negligence and Compensation Cases Annotated*, X, 5–9 (1910–16).

[9] Public Document No. 267, Sixty-fourth Congress, H.R. 15316 (1916).

[10] 34 U.S. Stat. 476 and supplemental act (May 30, 1908); 36 U.S. Stat. 298 (June 30, 1906).

An act for the prevention of manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.[1]

Act March 4, 1907 (H.R. 24, 815). Inspection of meats and meat food products for use in interstate and foreign commerce; examination of cattle, etc., before slaughtering; diseased animals to be slaughtered separately and their carcasses examined.

Federal child-labor law which prohibits the shipment of products in interstate commerce manufactured or produced by employment of children under a certain age.

7. In a general way the socialization of the law is also seen from the following steps in the development of the statutory laws of the several states of the United States. Within the last few years there have been introduced in almost all the states uniform code pleadings and uniform negotiable instrument acts, and great efforts are being made to introduce uniform divorce laws, uniform workmen's compensation acts, and the like. On the part of the federal government in this respect there have been put in operation a law regulating uniform bills of lading, uniform grading of grain, compensation acts for employees of the government, the Interstate Commerce Commission, Federal Trade Commission, Workmen's Compensation Commission, Tariff Commission, and other commissions of similar nature.

You will see from the annual report of the American Bar Association as outlined by the president that thousands of statutes are passed in a single year by the forty-eight legislatures of the different states, a vast majority of which have served little purpose in correcting the supposed social and economic evils aimed at, but it shows the effort on the part of the people to bring their governments into cognizance with their conception of a free state.[2] In particular we might refer you to the record of a single year's efforts on the part of state courts in their decisions affecting labor. (See United States Department of Labor, Bureau of Labor Statistics,

[1] Act June 3, 1906 (34 Stat. 768).

[2] *Annual Report of American Bar Association* (1913). Address of the president, pp. 364–92.

No. 189, 1915, which contains 289 pages of the synopsis of decisions of courts on such questions alone.)

Today the dominant phases of the development of American jurisprudence are those exhibited by the socialization of the law, on the one hand, along the lines of social-insurance laws which are based upon the public purpose involved in providing for the laboring classes a normal physical existence for the whole life consistent with a wholesome moral and social welfare, and in the regulation of hours and conditions of employment of women, and prohibiting the employment of children under a certain age, the fixing of a minimum wage, public health and morals; on the other hand, in providing such remedies by legislative action as eliminate the friction and economic waste arising out of conflicts between groups of employees and their employers over wages and conditions of employment.

All laws which have been developed by socialization processes into the groups of principles of jurisprudence just described are included in the primitive elements of the folkways described by Professor W. G. Sumner.

The late Professor W. G. Sumner, of Yale University, has shown by the results of an analysis[1] of the scientific discoveries of anthropology and ethnology of primitive men and society that underlying the development of manners, customs, and laws (in a broad legal sense) of a people are what he calls "folkways."

> With primitive men the first task of life was to live. They began with acts, not with thoughts. Every moment brought necessities which must be satisfied at once. Need was the first experience, and it was followed at once by blundering efforts to satisfy it. The method is that of trial and failure, which produces repeated pain, loss, and disappointments. Pleasure and pain, on the one side and the other, were the rude constraints which define the line on which efforts must proceed. The ability to distinguish between pleasure and pain is the only physical power which is to be assumed. Thus ways of doing things were selected which were expedient. Along the course on which efforts were compelled to go, habit, routine, and skill were developed. The struggle to maintain existence was carried on, not individually, but in groups. Each profited by the other's experience; hence there was concurrence toward that which proved to be most expedient. All at last adopted the same way

[1] William G. Sumner, *Folkways*, p. 1 (Quinn & Co., 1911).

for the same purpose; hence the ways turned into customs and became mass phenomena. In this way the folkways arise. The young learn them by tradition, imitation, and authority. The folkways at a time provide for all the needs of life then and there. They are uniform, universal in the group, imperative and invariable.[1]

In speaking of the social force of folkways Professor Sumner says: "The operation by which Folkways are produced consist in the frequent repetition of petty acts, often by great numbers acting in concert, or at least acting in the same way when face to face with the same need. The immediate motive is *interest.* It produces habit in the individual and custom in the group."[2]

In the last sentences of the section just cited Sumner says:

> The most civilized men, both in food quest and in war, do things which are painful, but which have been found to be expedient. Perhaps these cases teach the sense of *social welfare* better than those which are pleasurable and favorable to welfare. The former cases call for some intelligent reflection on experience. When this conviction as to the relation of welfare is added to the folkways they are converted into mores and, by virtue of the philosophical and ethical element added to them, they win utility and importance and become the source of the science and the art of living.
>
> The folkways are not, therefore, creations of human purpose and wit. They are like products of *natural forces* which men unconsciously set in operation, or they are like the instinctive ways of animals, which are developed out of experience, which reach a final form of maximum adaptation to an interest, which are handed down by tradition and admit of no exception or variation, yet change to meet new conditions, still within the same limited methods, and without radical reflection or purpose.[3]

As a concrete example of a folkway, we quote from Sumner's work, sec. 360: "It [marriage arrangement] is a product of the folkways, being the resultant custom which arises, in time, out of the ways of satisfying *interests* which separate individuals, or pairs, invent and try. It follows that marriage in all its forms is in mores of the time and place."

Up to the beginning of the nineteenth century there were evolved out of the birth, growth, commercial domination, and perishing of world-powers two fundamental principles of the socialization of

[1] *Ibid.*, p. 2. [2] *Ibid.*, sec. 2.

[3] *Negligence and Compensation Cases Annotated*, X, 33, note. (Chicago: Callaghan & Co., 1916.)

the law, in every respect in connascence with Sumner's principles of folkways, viz.:

The providing of eleemosynary institutions and elementary public-school systems by the state, which are sustained by general public funds of the state. The creation of these institutions is simply an example of "the extension of the Christian conception of the state."[1]

Thus through the discoveries of Sumner, Jhering's conceptions, "that rights are legally protected interests" and "the 'Zweck' or purpose of the law," are traced to their fundamental primitive basis. We are thus enabled to declare the fundamental axiom of jurisprudence of our democracy to be:

All law, whether it be that expressed by legislative acts, state or federal constitutions or judge-made law, is brought into existence for the purpose of correcting certain economic inequalities (direct or indirect), and the permanence of any law depends upon the accuracy with which it corrects the economic inequality sought to be cured.

It therefore was left to Professor W. G. Sumner to demonstrate in his definition of folkways and the proof of their characteristics not only what the fundamental attributes of "legally protected interests and the purpose ('Zweck')" are, but also those of Savigny's "organic principles of the law which have life and that 'law' to which all law is subject."

8. *Socialization of the law in its relation to the efficiency of the industrial and governmental organizations of the United States.*—Charles P. Steinmetz, in discussing "Industrial Efficiency and Political Waste," says:

There will be competition, whether gas-engine or electric motor is to be used, whether a local steam-turbine plant is to be installed or power brought from a long-distance transmission system. But the decision will be made on the basis of the relative economy.

Financial manipulation for the mere acquisition of more money, without regard to constructive economical organization, necessarily must be impossible. There must be an active co-operation between all producers, from the unskilled laborer to the master-mind which directs a huge industrial organization. Such active co-operation presupposes that everybody feels personally interested in the industrial economy. This presupposes that the fear of unemployment, of sickness, and old age has been relegated to the relics of barbarism, and

[1] Bismarck's speeches before the Reichstag, 1883–84.

everybody is assured an appropriate living, is assured employment when able to work, and protected against want, maintained in his or her standard of living when not able to work—not as a matter of charity, but as an obvious and self-evident duty of society toward the individual.

This can be done, as it has been done in other countries, by effective social legislation. . . . .

As a structural foundation, on which to build such structure by evolution in correspondence with our democratic national temperament, we have our political governments—federal, state, and municipal—our large national societies, and our industrial corporations. Of these, the political government is the only one which is all-embracing, is controlled by and responsible to all citizens, at least nominally. Therefore, while its constructive power may be practically nil, due to its form of organization, it has a vast inhibitory power (in our country) far greater than any other power in our country. We have seen this and continuously see it in the action toward corporations in the national conservatism movement, even in the power exerted by subordinate governmental bureaus.

Thus no organization which does not include the political government as an essential part of the structure can hope to succeed. The natural suggestion, then, would be to have the federal government, with its subordinate state and municipal governments, organize, control, and administrate the country's economic-industrial system.

Thus the political government would acquire and operate all means of transportation and communication—railroads, canals, pipe lines, mail and express, telegraph and telephone. It would supervise and control all corporations and their relations with one another and toward the public. It would control the relation of employees within the corporation by mandatory arbitration, by unemployment, sickness, and old-age insurance; it would control the hours of work and working conditions, etc.[1]

Assuming that Steinmetz has correctly stated the outlines of the problem to be solved in order that the United States may establish industrial efficiency and eliminate political waste in the sense in which this problem has been solved by the Imperial German government, we believe that we have pointed out the lines along which the preliminary development of legislation should move.

[1] *Industrial Efficiency and Political Waste* (November 1916), p. 725–27.